

No. **77-1058**

Supreme Court, U. S.

**FILED**

**JAN 25 1978**

**MICHAEL RODAK, JR., CLERK**

IN THE SUPREME COURT  
OF THE UNITED STATES

*CAROL NUTTER,*

*Petitioner,*

*vs.*

*PERFECTO TORREZ d/b/a  
PERFECTO PLUMBING AND  
SEWAR SERVICE and WILLIAM  
FURNACE COMPANY,*

*Respondents.*

\*\*\*\*\*

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE OF KANSAS

\*\*\*\*\*

FRED W. PHELPS, ESQ.  
FRED W. PHELPS - CHARTERED  
Phelps Building  
1414 Topeka Boulevard  
Post Office Box 1886  
Topeka, Kansas 66601  
913/233-4162

ROBERT E. TILTON, ESQ.  
TILTON & DILLON  
310 Columbian Title Building  
820 Quincy Street  
Topeka, Kansas 66612  
913/233-9665

## Table of Contents

Opinions Below-----	1
Jursidiction-----	2
Questions Presented-----	2
Statutes and Regulations Involved-----	3
Statement of the Case-----	8
Federal Question Raised-----	10
Argument for Allowance of Writ-----	11
Conclusion-----	12
Certificate of Service-----	13
Unpublished Memorandum of the Court of Appeals of the State of Kansas, <u>Nutter v. Torrez</u> , case number 48,534-----	Appendix "A"
Order of Supreme Court of the State of Kansas denying Petition for Review, <u>Nutter v. Torrez</u> , case number 48,534-----	Appendix "B"
Order of the Supreme Court of the State of Kansas dated October 26, 1977, denying Petition for Reconsideration, <u>Nutter v. Torrez</u> , case number 48,534-----	Appendix "C"
Letter of Dr. W. Wike Scamman-----	Appendix "D"

Affidavit of Dr. W. Wike Scamman-----Appendix "E"

Petition for Reconsideration of Order denying  
Petition for Review, Nutter v. Torrez, case  
number 48,534, in the Supreme Court of the  
State of Kansas-----Appendix "F"

## Table of Cases

<u>Department of State v. Pink</u> , 317 U.S. 264, 63 S.Ct. 233, 87 L.Ed. 254-----	11
<u>United States v. Adams</u> , 383 U.S. 39, 86 S.Ct. 708, 15 L.Ed.2d 572-----	11

## Table of Statutes Cited

K.S.A. 60-256-----	3
28 U.S.C. §1257(3)-----	2, 11
28 U.S.C. §2101(c)-----	2

## Table of Other Authorities

Kansas Appellate Rules 7.06-----	3
----------------------------------	---

United States Constitution,  
Seventh Amendment----- 3

United States Constitution,  
Fourteenth Amendment----- 3

PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE OF KANSAS

TO: The Honorable, the Chief Justice and Associates  
Justices of the Supreme Court of the United States:

Petitioner, Carol Nutter, prays that a  
Writ of Certiorari be issued to review the judgment  
order of the Supreme Court of the State of Kansas in  
the above case on October 26, 1977.

A. Opinions Below

The official reports of the Kansas Appellate  
court system pertaining to this action are case  
number 48,534 in the Court of Appeals of the State of  
Kansas, Nutter v. Torrez, unpublished memorandum  
opinion, which is attached hereto and incorporated  
herein as Appendix "A"; order of the Supreme Court  
of the State of Kansas, case number 48,534, denying  
Nutter's petition for review, which is attached hereto  
and incorporated herein as Appendix "B"; and order  
of the Supreme Court of the State of Kansas dated  
October 26, 1977 in case number 48,534 denying Nutter's  
petition for reconsideration of the previous order  
denying Nutter's petition for review, and which is  
attached hereto and incorporated herein as Appendix "C".

None of the opinions or decisions have been reported.

#### B. Jurisdiction

The date of the final judgment sought to be reviewed is October 26, 1977, which was entered on that same date, wherein the Supreme Court of Kansas denied Nutter's petition for reconsideration of the previous order denying review.

The date of the order denying rehearing by the Supreme Court was October 26, 1977. The date of the original appellate judgment by the Intermediate Kansas Court of Appeals was July 22, 1977.

The statutory provisions believed to confer jurisdiction on this Court to review the October 26, 1977 judgment and to grant certiorari to the Kansas Supreme Court is 28 U.S.C. §2101(c) and 28 U.S.C. §1257(3).

#### C. Questions Presented

The question presented for review in this petition, succinctly stated, is whether the Kansas Supreme Court acted improperly and denied

petitioner basic constitutional rights when the said Supreme Court refused to review and rehear and reconsider the Court of Appeals' decision when newly-discovered evidence had been presented indicating that summary judgment had been improperly granted and further clearly indicating that the sole basis of the Kansas Court of Appeals' decision no longer existed because of the newly-discovered evidence.

#### D. Statutes and Regulations Involved

The statutory provisions involved are K.S.A. 60-256; Kansas Appellate Rules number 7.06; Amendment Number 7 to the United States Constitution; Amendment Number 14 to the United States Constitution. Those statutes, amendments and regulations provide:

"A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of twenty (20) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting



affidavits for a summary judgment in the party's favor as to all or any part thereof.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

The motion shall be served at least ten (10) days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary,

the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the actions as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

Should it appear from the affidavits of a party opposing the motion that he or she cannot for reasons stated present by affidavit facts essential to justify his or her opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him or her to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt." (K.S.A. 60-256).

\*\*\*\*\*

"A motion for rehearing or modification in a case decided by the Supreme Court may be served within twenty (20) days of the date of the decision. The issuance of the mandate shall be stayed pending

the determination of the issues raised by such a motion. If a rehearing is granted, such order suspends the effect of the original decision until the matter is decided on rehearing.

If no motion for rehearing is filed or upon denial of a motion for rehearing, the clerk of the appellate courts shall, unless the court otherwise orders, issue a mandate on the decision of the Supreme Court to the district court together with a copy of the opinion." (Kansas Appellate Rules number 7.06).

\*\*\*\*\*

"In suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise examined in any Court of the United States, than according to the rules of the common law." (Amendment Number 7 to the United States Constitution).

\*\*\*\*\*

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Amendment Number 14 to the United States Constitution).

E. Statement of the Case

In January of 1973, Carol Nutter's two year old son, Daina T. Nutter, died. Thereafter, Nutter commenced this wrongful death action against the Defendants, manufacturer and installer of a furnace in Nutter's home. Mrs. Nutter alleged that the Defendants have been negligent in both the manufacturing and installation of the furnace, and that the cause of her son's death was carbon monoxide poisoning from the furnace.

Following the small child's death, and pursuant to request of Nutter's family doctor, Dr. Antonoi Huaman, then the County Coroner for Shawnee County, Kansas performed an autopsy. The autopsy revealed pneumonia as the cause of death, and further specifically stated that the Coroner's findings were incompatible with carbon monoxide poisoning.

The trial court dismissed the action on summary judgment finding that the uncontroverted medical evidence (i.e., the autopsy report of Dr. Huaman) showed there was no causal connection between the alleged misconduct of the Defendants and the death of the child.

The case was appealed to the Kansas Court of Appeals. That Court affirmed the summary judgment, emphasizing the autopsy report which established that the cause of death was pneumonia and not monoxide poisoning, and basing their entire opinion on that autopsy report.

Mrs. Nutter thereafter asked the Kansas Supreme Court to review the Court of Appeal's decision, but that was declined on September 8, 1977. Thereafter, and on September 30, 1977, Mrs. Nutter, acting on her own, obtained a letter from the acting Coroner of Shawnee County, Kansas, W. Wike Scamman, stating in part: "I find it more probable that he died as a result of carbon monoxide and gas inhalation, rather than viral pneumonitis, as was indicated on the Death Certificate." The letter concluded: "Therefore, I will revise the Autopsy Diagnosis as well as the Death Certificate." A copy of said letter is attached hereto and incorporated herein as Appendix "D". Shortly thereafter, and on October 4, 1977, counsel for Nutter obtained an affidavit from Dr. Scamman to the same effect, and a copy of that affidavit is attached hereto and incorporated herein as Appendix "E".

Based upon such newly discovered evidence, Mrs. Nutter filed a Petition for Reconsideration in



the Kansas Supreme Court, setting forth the newly-discovered evidence, and attaching a copy of the letter of Dr. Scamman as well as the affidavit. On October 26, 1977, the Supreme Court of Kansas, without any type of opinion, denied that Petition.

#### F. Federal Question Raised

The federal question involved herein surrounding right to jury trial and the right to due process before deprivation of person and property, was not and could not have been raised until Nutter's Petition for Reconsideration of Order denying her petition for review was filed. A copy of that is attached hereto and incorporated herein as Appendix 'F'. The method of raising that federal question was by that pleading, pleading and assignment of error. Specifically, that pleading stated in pertinent part:

"It would be gross injustice to deny Mrs. Nutter her 'day in court' in this action because of an error on the part of a public official. It obviously is unjust to say to this appellant that she does not have the right to a jury trial because of a Death Certificate, when that exact same Death Certificate has been revised and amended as a matter of public record."

The raising of such federal question was timely because it was raised almost immediately when it was learned that the autopsy report was in fact being revised. Accordingly, there has been appropriately raised a question of rights and privileges under the United States Constitution, thus vesting jurisdiction in this Court pursuant to 28 U.S.C. §1257(3).

#### G. Argument for Allowance of Writ

First, Petitioner submits that this Writ is timely because it has been taken within ninety days after the entry of the October 26, 1977 judgment and decree. (See 28 U.S.C.A. §2101(c)). The ninety days could not have commenced on a federal question until that last order because the previous orders of the Kansas Appellate Courts had not concerned federal questions. Further, the clear and undisputed law of this Court is that the time for filing of a Petition for Certiorari runs from the date of an order overruling a motion to amend or alter or modify a previous judgment. (United States v. Adams, 383 U.S. 39, 86 S.Ct. 708, 15 L.Ed. 2d 572). This rule was also recognized in Department of State v. Pink, 317 U.S. 264, 63 S.Ct. 233, 87 L.Ed 254, where the Court held that a petition for rehearing tolled the running of the ninety day period for filing of certiorari because that petition operated to suspend the finality of the state court's judgment until the state court had decided whether the original judgment should be modified. Thus, there is no question but that the



ninety day time for filing of certiorari did not commence until the judgment of October 26, 1977, and therefore this petition is timely. The provisions set forth in Rule 19 of this Court as to considerations governing review on certiorari, is that a very substantial federal question has been raised. This Petitioner lost her son and now has lost her day in court without a jury trial or due process. Both law and equity require that she be allowed to have this Court consider her plight and remand this action to the appropriate trial court in Shawnee County, Kansas for determination on the merits. It is not in accord with other appropriate and applicable decisions of this Court to deny litigants their right to a day in court, jury trial, and due process.

#### H. Conclusion

Petitioner prays that the relief requested herein be granted for the reasons previously stated.

ROBERT E. TILTON, FSQ. of  
TILTON & DILLON  
310 Columbian Title Building  
820 Quincy Street  
Topeka, Kansas 66612  
913/233-9665

FRED W. PHELPS, JR., ESQ. of  
FRED W. PHELPS - CHARTERED  
Phelps Building  
1414 Topeka Boulevard  
Post Office Box 1886  
Topeka, Kansas 66601  
913/233-4162

ATTORNEYS FOR PETITIONER.

#### CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rules of the United States Supreme Court, the undersigned hereby certifies and indorses that three copies of the above and foregoing Petition for Writ of Certiorari to the Supreme Court of Kansas was served on counsel for all parties concerned, by placing such copies in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office address as follows:

James Benfer, Esq., 1400 Topeka  
Boulevard, Post Office Box 2217,  
Topeka, Kansas 66601, Attorney for  
Perfecto Torrez, d/b/a Perfecto  
Plumbing and Sewar Service, Incorporated; and,

Michael J. Schenk, Esq., 810  
Merchants National Bank Building,  
Topeka, Kansas 66612, Attorney for  
William Furnace Company.

Such certification is made pursuant to  
Rule 33(1) and 3(b).

Certification is further made that such mailing occurred on the 23rd day of January, 1978. Further, pursuant to Rule 21(3) of the Rules of this Court, 40 copies of this petition were mailed, air mail, special delivery, postage prepaid, to the Clerk of the United States Supreme Court, on the 23rd day of January, 1978.

TILTON & DILLON  
310 Columbian Title Building  
820 Quincy Street  
Topeka, Kansas 66612  
913/233-9665

By: Robert E. Tilton  
ROBERT E. TILTON

FRED W. PHELPS - CHARTERED  
Phelps Building  
1414 Topeka Boulevard  
Post Office Box 1886  
Topeka, Kansas 66601  
913/233-4162

By: Fred W. Phelps, Jr.  
FRED W. PHELPS, JR.

APPENDIX "A"

No. 48,534

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CAROL NUTTER,  
Appellant,

v.

PERFECTO TORREZ,  
d/b/a PERFECTO PLUMBING AND SEWER SERVICE, INC.,  
and WILLIAMS FURNACE COMPANY,  
Appellees.

MEMORANDUM OPINION

Appeal from Shawnee district court, division No. 1;  
WILLIAM RANDOLPH CARPENTER, judge. Opinion filed July 22,  
1977. Affirmed.

Harold E. Doherty, of Topeka, for the appellant.

George Farrell, Jr. and David L. McLane, of Topeka,  
for Perfecto Torrez, appellee.

Michael J. Schenk and Herbert A. Marshall, of  
Marshall, Hawks, McKinney & Hendrix, of Topeka, for Williams  
Furnace Company, appellee.

Before SWINEHART, P.J., REES and PARKS, JJ.

PARKS, J.: The plaintiff, Carol Nutter, mother of the  
decedent, Daina Torbert Nutter, filed a wrongful death action  
against the defendant Williams Furnace Company, the manufacturer

of a furnace, and the defendant Perfecto Torrez d/b/a Perfecto  
Plumbing and Sewer Service, Inc., who allegedly installed the  
furnace in plaintiff's home. The plaintiff alleged that the  
defendants were negligent in the manufacture and installation  
of the furnace and that the cause of her son's death was carbon  
monoxide poisoning.

The pertinent facts are: On the morning of January  
17, 1973, Carol Nutter found her son dead in his bed. Dr.  
Robert Parman, the family pediatrician, was called to the home  
and pronounced the child dead. Dr. Parman questioned the family  
in reference to possible drug ingestion, trauma or carbon  
monoxide poisoning, but as far as the family knew at that time,  
there were no problems involved in any of these areas. Dr.  
Parman raised the question about carbon monoxide poisoning  
because he noticed a wall furnace in the room where the child  
had been sleeping. Dr. Parman expressed his concern to the  
county coroner, Dr. Huaman, who performed an autopsy the following  
day. The autopsy revealed congestion and condensation of both  
lungs suggestive of viral pneumonitis. The microscopic  
examination revealed changes of influenzal pneumonia. Dr.  
Huaman commented in his autopsy report that the gross findings  
and the gross appearance of the blood were incompatible with  
carbon monoxide poisoning and therefore no chemical tests were  
performed on the blood.

Both defendants filed a motion for summary judgment.  
The trial court sustained the motions, stating in part:

"The uncontroverted medical evidence  
of defendants discloses that there is no causal  
connection between alleged conduct of defendants  
and the death of the child in question. Plaintiff  
has failed to show any competent medical evidence

which would establish her claim and contradict the medical discovery of said defendants."

Plaintiff appeals from this adverse ruling.

We will first consider plaintiff's contention that the court erred in holding as a matter of law that there was no question of fact as to the proximate cause of the child's death.

Where the sole question presented is one of law, a final determination may be had on a motion for summary judgment. Wagner v. Mahaffey, 195 Kan. 586, 408 P. 2d 602. A motion for summary judgment should be sustained only where there is no genuine issue of material fact, and a party is entitled to judgment as a matter of law. Mildfelt v. Lair, 221 Kan. 557, 559, 561 P. 2d 805; Harold v. Harold, 218 Kan. 284, 543 P. 2d 1019.

It may be said that an issue of fact is not genuine unless it has legal controlling force as to a controlling issue. A disputed question of fact which is immaterial to the issues does not preclude summary judgment. If the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of a material fact. It has been said that before summary judgment is granted the court must be convinced that the issue is not genuine, or that there are only immaterial or imaginary factual issues. Secrist v. Turley, 196 Kan. 572, 412 P. 2d 976.

Here, we have the coroner's report giving the final diagnosis and cause of death as influenzal pneumonia; and a clarification of that diagnosis that since the gross findings and appearance of the blood were incompatible with carbon monoxide poisoning, no chemical tests were performed. The only

medical expert designated by plaintiff in her answer to interrogatories as one who would testify contrary to the coroner's report, was Dr. Parman. However, Dr. Parman stated that he had no opinion of the cause of death which he could express with any degree of medical certainty other than that listed in the coroner's report.

Inasmuch as the cause of death is the gravamen of plaintiff's claim, we agree with the trial court that there is no genuine issue of material fact as to either the causal connection between the acts of the defendants and the death of the child, or the cause of death itself. There was no indication of evidence reaching the degree of reasonable medical probability that the death resulted from carbon monoxide poisoning. Nunez v. Wilson, 211 Kan. 443, 507 P. 2d 329. The coroner's report was the only medical evidence which could be expressed with any degree of medical certainty. Accordingly, we must conclude that the trial court was correct in granting its order of summary judgment.

Plaintiff next contends that the trial court erred in refusing to reconsider its previous ruling. The following excerpt is taken from the court's letter in response to an inquiry by plaintiff's counsel concerning the Memorandum Decision filed May 28, 1976:

"It should be noted that the Court carefully considered plaintiff's memorandum and correspondence attached thereto, as well as the arguments of counsel. The Court concluded as set forth in the Memorandum Decision that the previous ruling sustaining the defendants' motion for summary judgment should not be disturbed."



In our opinion this statement disposes of the second statement of points raised by the plaintiff.

The judgment is affirmed.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 48,534

CAROL NUTTER,  
Appellant,

v.

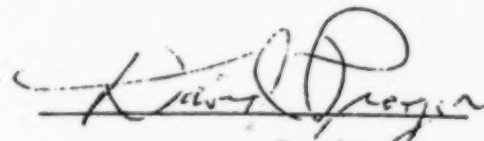
PERFECTO TORREZ, d/b/a PERFECTO  
PLUMBING and SEWER SERVICE,  
INCORPORATED, and WILLIAM FURNACE  
COMPANY,  
Appellees.

O R D E R

The petition for review in the above captioned  
case is considered and denied. The opinion of the Court of  
Appeals filed July 22, 1977, is approved.

Dated September 8, 1977.

For the entire court.

  
Justice

RECEIVED

OCT 4 1977

FRED W. PHELPS, ESQ.

APPENDIX "C"

IN THE SUPREME COURT OF THE STATE OF KANSAS

Carol Nutter, Appellant,

No. 48,534

Perfecto Torres, d/b/a Perfecto  
Plumbing and Sewer Service, Inc.  
et al., Appellees.

You are hereby notified of the following action taken in the above entitled case:

Petition for reconsideration of order denying Nutter's  
Petition for Review.

Petition for reconsideration DENIED.

Date October 26, 1977

Yours very truly,

LEWIS C. CARTER  
Clerk, Supreme Court

RECEIVED

OCT 28 1977

FRED W. PHELPS, ESQ.

APPENDIX 'D'

BEST COPY AVAILABLE



THE LATTIMORE-FINK LABORATORIES, INC.  
A BANCOR LABORATORY 115 WEST CRANE

TOPEKA, KANSAS 66603

September 30, 1977

Mrs. Carol Nutter  
1422 Munson Street  
Topeka, Kansas

Dear Mrs. Nutter:

On reviewing the circumstances surrounding the death of your son Daina Torbert Nutter, on January 17, 1973, and reviewing the Gross Description and Microscopic Sections of the Autopsy, I find it more probable that he died as a result of carbon monoxide and gas inhalation, rather than viral pneumonitis, as was indicated on the Death Certificate.

The sections of the lungs show marked edema along with an area of hemorrhage with practically no inflammation present. With a viral pneumonitis, I would expect to find at least a mild inflammatory infiltrate.

Therefore, I will revise the Autopsy Diagnosis as well as the Death Certificate.

Yours truly,

W. Wike Scamman, M.D., Coroner

LATTIMORE-FINK LABORATORIES, INC.

WWS:et

APPENDIX 'E'



IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 48,534

CAROL NUTTER,  
Appellant,

v.

PERFECTO TORREZ, d/b/a PERFECTO  
PLUMBING AND SEWER SERVICE,  
INCORPORATED, and WILLIAM FURNACE  
COMPANY,  
Appellees.

A F F I D A V I T

STATE OF KANSAS :  
                  :SS  
COUNTY OF SHAWNEE :

The undersigned, of lawful age, and being first duly  
sworn upon his oath, deposes and says:

1. That he is a medical doctor and coroner;
2. That he recently has reviewed the circumstances sur-  
rounding the death of Daina Torbert Nutter on January 17, 1973,  
and in so doing has reviewed the Gross Description and Microscopic  
Sections of the Autopsy performed on Daina Torbert Nutter, and base  
on such review his opinion is that it is more probable that Daina  
died as a result of carbon monoxide and gas inhalation, rather than  
viral pneumonitis, as is indicated on the Death Certificate.

3. The medical reason for his opinion is that the lungs  
showed marked edema along with an area of hemorrhage with practical  
ly no inflammation present. Had there been a viral pneumonitis,

there would have been at least a mild inflammatory infiltrate,  
which there was not.

4. That because of his opinion and review of the records  
as described above, he will revise the Autopsy Diagnosis as well  
as the Death Certificate to reflect the above.

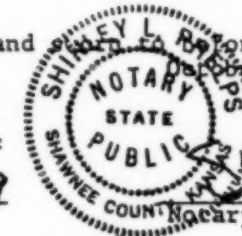
5. Further affiant saith not.

*W. Wike Scamman, M.D.*  
W. WIKE SCAMMAN, M.D.  
Coroner

Subscribed and sworn to before me this 4th day of  
December, 1977.

My Commission expires:

December 24, 1979



Shirley L. Phelps  
Notary Public

APPENDIX 'F'

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 48,534

CAROL NUTTER,  
Appellant,

**FILED**

OCT 4 - 1977

LEWIS C. CARTER  
CLERK APPELLATE COURTS

v.

PERFECTO TORREZ, d/b/a PERFECTO  
PLUMBING and SEWER SERVICE,  
INCORPORATED, and WILLIAM FURNACE  
COMPANY,  
Appellees.

PETITION FOR RECONSIDERATION OF ORDER  
DENYING NUTTER'S PETITION FOR REVIEW

Comes now the appellant above-named, Carol Nutter, and moves this court to reconsider its order of September 8, 1977 whereby Nutter's Petition for Review was denied.

In support hereof, appellant shows the court that summary judgment was granted in this action at the trial level solely because of an uncontroverted coroner's report and death certificate, which report indicated that Nutter's deceased son could not possibly have died from gas inhalation. Likewise, the Kansas Court of Appeals affirmed that summary judgment because of that uncontroverted report and certificate. Your petitioner further assumes that this court declined to grant review of this matter because of that uncontroverted report.

Appellant now shows this court that a recent report from W. Wike Scamman, M.D., Coroner, has reviewed certain portions of the autopsy

performed on Nutter's deceased son, and based on that review, finds it "more probable that he (the deceased son) died as a result of carbon monoxide and gas inhalation, rather than viral pneumonitis, as was indicated on the Death Certificate." Because of Dr. Scamman's review of the Death Certificate, and his opinion as to its error, he is going to revise the Autopsy Diagnosis as well as the Death Certificate. (See attached letter of Dr. Scamman.) Dr. Scamman has also executed an affidavit in this regard, which is attached hereto and incorporated herein by reference.

Thus, the public records indicating the cause of your appellant's son's death will indicate that the death was most probably caused by carbon monoxide and gas inhalation. It would be gross injustice to deny Mrs. Nutter her "day in court" in this action because of an error on the part of a public official. It obviously is unjust to say to this appellant that she does not have the right to a jury trial because of a death certificate, when that exact same death certificate has been revised and amended as a matter of public record.

WHEREFORE, your appellant prays that this court reconsider its decision of September 8, 1977 whereby appellant's Petition for Review was denied, and that this court enter a judgment reversing the trial court's granting of summary judgment and remanding this case to the District Court level for jury trial.

Respectfully submitted,

FRED W. PHELPS - CHARTERED  
3701 West Twelfth Street  
Post Office Box 4391  
Topeka, Kansas 66604  
913/273-1420

By:

FRED W. PHELPS, Jr.  
Attorney for Plaintiff

# CERTIFICATE OF SERVICE

I hereby certify that a conformed copy of the above and foregoing "Petition for Reconsideration of Order Denying Nutter's Petition for Review" was regularly mailed on this 4th day of October, 1977, to:

James E. Benfer, Esq.  
1400 Topeka Boulevard  
Topeka, Kansas 66612

Herbert A. Marshall, Esq.  
and  
Michael J. Schenk, Esq.  
801 Merchants National Bank Building  
Topeka, Kansas 66612

By:

FRED W. PHELPS, Jr.  
Attorney for Plaintiff

No. 77-1053

Supreme Court, U. S.  
**FILED**  
**JAN 25 1978**  
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT  
OF THE UNITED STATES

CAROL NUTTER,

*Petitioner,*

vs.

PERFECTO TORREZ, d/b/a  
PERFECTO PLUMBING AND  
SEWER SERVICE, INC., and  
WILLIAM FURNACE COMPANY,

*Respondents*

\* \* \* \* \*

REVISED APPENDICES TO PETITIONER'S  
"PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF THE STATE OF KANSAS"

\* \* \* \* \*

Fred W. Phelps, Jr., Esq.  
FRED W. PHELPS -  
CHARTERED  
Phelps Building  
1414 Topeka Boulevard  
Post Office Box 1886  
Topeka, Kansas 66601  
913/233-4162

Robert E. Tilton, Esq.  
TILTON & DILLON  
310 Columbian  
Title Building  
820 Quincy Street  
Topeka, Kansas 66612  
913/233-9665



REVISED APPENDICES TO PETITIONER'S  
"PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF THE STATE OF KANSAS"

The "Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas" was previously filed (with copies going to opposing counsel) on the 23rd day of January, 1978.

The following is a revised appendices to said "Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas".

TABLE OF CONTENTS

Table of Contents -----	i
Appendix "A" -----	ii
Appendix "B" -----	iii
Appendix "C" -----	iv
Appendix "D" -----	v
Appendix "E" -----	vi
Appendix "F" -----	vii
Certificate of Service -----	viii

Appendix "A"

NOT DESIGNATED FOR PUBLICATION

No. 48,534

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CAROL NUTTER,  
Appellant,

v.

PERFECTO TORREZ,  
d/b/a PERFECTOR PLUMBING AND SEWER SERVICE, INC.,  
and WILLIAMS FURNACE COMPANY,  
Appellees.

MEMORANDUM OPINION

Appeal from Shawnee district  
court, division No. 1; WILLIAM RANDOLPH  
CARPENTER, judge. Opinion filed July 22,  
1977. Affirmed.

Harold E. Doherty, of Topeka,  
for the appellant.

George Farrell, Jr. and David L.  
McLane, of Topeka, for Perfecto Torrez,  
appellee.

Michael J. Schenk and Herbert A.  
Marshall, of Marshall, Hawks, McKinney  
& Hendrix of Topeka, for Williams Furnace  
Company, appellee.

Before SWINEHART, P.J., REES  
and PARKS, JJ.

PARKS, J.: The plaintiff, Carol  
Nutter, mother of the decedent, Daina  
Torbert Nutter, filed a wrongful death  
action against the defendant Williams  
Furnace Company, the manufacturer of a  
furnace, and the defendant Perfecto Torrez

d/b/a Perfecto Plumbing and Sewer Service, Inc., who allegedly installed the furnace in plaintiff's home. The plaintiff alleged that the defendants were negligent in the manufacture and installation of the furnace and that the cause of her son's death was carbon monoxide poisoning.

The pertinent facts are: On the morning of January 17, 1973, Carol Nutter found her son dead in his bed. Dr. Robert Parman, the family pediatrician, was called to the home and pronounced the child dead. Dr. Parman questioned the family in reference to possible drug ingestion, trauma or carbon monoxide poisoning, but as far as the family knew at the time, there was no problems involved in any of these areas. Dr. Parman raised the question about carbon monoxide poisoning because he noticed a wall

furnace in the room where the child had been sleeping. Dr. Parman expressed his concern to the county coroner, Dr. Hauman, who performed an autopsy the following day. The autopsy revealed congestion and condensation of both lungs suggestive of viral pneumonitis. The microscopic examination revealed changes of influenzal pneumonia. Dr. Hauman commented in his autopsy report that the gross findings and the gross appearance of the blood were incompatible with carbon monoxide poisoning and therefore no chemical tests were performed on the blood.

Both defendants filed a motion for summary judgment. The trial court sustained the motions, stating in part:



"The uncontroverted medical evidence of defendants discloses that there is no casual connection between alleged conduct of defendants and the death of the child in question. Plaintiff has failed to show any competent medical evidence which would establish her claim and contradict the medical discovery of said defendants."

Plaintiff appeals from this adverse ruling.

We will first consider plaintiff's contention that the court erred in holding as a matter of law that there was no question of fact as to the proximate cause of the child's death.

Where the sole question presented is one of law, a final determination may be had on a motion for summary judgment. Wagner v. Mahaffey, 195 Kan. 586, 408 P.2d 602. A motion for summary judgment should be sustained only where there is no genuine issue of material fact, and a party is entitled to judgment as a matter of law. Mildfelt v. Lair, 221 Kan. 557, 559, 561 P.2d 805; Harold v. Harold, 218 Kan. 284, 543 P.2d 1019.

It may be said that an issue of fact is not genuine unless it has legal controlling force as to a controlling issue. A disputed question of fact which is immaterial to the issues does not preclude a summary judgment. If the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of a material fact. It has been said that before

summary judgment is granted the court must be convinced that the issue is not genuine, or that there are only immaterial or imaginary factual issues. Sacrist v. Turley, 196 Kan. 572, 412 P.2d 976.

Here, we have the coroner's report giving the final diagnosis and cause of death as influenzal pneumonia; and a clarification of that diagnosis that since the gross findings and appearance of the blood were incompatible with carbon monoxide poisoning, no chemical tests were performed. The only medical expert designated by plaintiff in her answer to interrogatories as one who would testify contrary to the coroner's report, was Dr. Parman. However, Dr. Parman stated that he had no opinion of the cause of

death which he could express with any degree of medical certainty other than that listed in the coroner's report.

Inasmuch as the cause of death is the gravamen of plaintiff's claim, we agree with the trial court that there is no genuine issue of material fact as to either the causal connection between the acts of the defendants and the death of the child, or the cause of death itself. There was no indication of evidence reaching the degree of reasonable medical probability that the death resulted from carbon monoxide poisoning. Nunez v. Wilson, 211 Kan. 443, 507 P.2d 329. The coroner's report was the only medical evidence which could be expressed with any degree of medical certainty.

Accordingly, we must conclude that the trial court was correct in granting its order of summary judgment.

Plaintiff next contends that the trial court erred in refusing to reconsider its previous ruling. The following excerpt is taken from the court's letter in response to an inquiry by plaintiff's counsel concerning the Memorandum Decision filed May 28, 1976:

"It should be noted that the Court carefully considered plaintiff's memorandum and correspondence attached thereto, as well as the arguments of counsel. The Court concluded as set forth in the Memorandum Decision that the previous

ruling sustaining the defendants' motion for summary judgment should not be disturbed."

In our opinion this statement disposes of the second statement of points raised by the plaintiff.

The judgment is affirmed.

Appendix "B"

IN THE SUPREME COURT  
OF THE STATE OF KANSAS

No. 48,534

CAROL NUTTER,  
Appellant,

v.

PERFECTO TORREZ, d/b/a PERFECTO  
PLUMBING and SEWER SERVICE,  
INCORPORATED, and WILLIAM FURNACE  
COMPANY,  
Appellees.

O R D E R

The petition for review in the  
above captioned case is considered and



denied. The opinion of the Court of  
Appeals filed July 22, 1977, is approved.

Dated September 8, 1977.

For the entire court.

/s/ David Prager

Justice.

Appendix "C"

IN THE SUPREME COURT  
OF THE STATE OF KANSAS

Carol Nutter, Appellant,

v.

Perfecto Torrz, d/b/a Perfecto  
Plumbing and Sewer Service, Inc.,  
et al, Appellees.

No. 48,534

You are hereby notified of the following  
action taken in the above entitled case:

Petition for reconsideration of order  
denying Nutter's Petition for Review.

Petition for reconsideration DENIED.

Yours very truly,

LEWIS C. CARTER  
Clerk, Supreme Court

Date: October 26, 1977

THE LATTIMORE-FINK LABORATORIES, INC.  
A DAMON LABORATORY 115 WEST CRANE  
TOPEKA, KANSAS 66603

September 30, 1977

Mrs. Carol Nutter  
1422 Munson Street  
Topeka, Kansas

Dear Mrs. Nutter:

On reviewing the circumstances surrounding the death of your son Daina Torbert Nutter, on January 17, 1973, and reviewing the Gross Description and Microscopic Sections of the Autopsy, I find it more probable that he died as a result of carbon monoxide and gas inhalation, rather than viral pneumonitis, as was indicated on the Death Certificate.

Appendix "D"

The sections of the lungs show marked edema along with an area of hemorrhage with practically no inflammation present. With a viral pneumonitis, I would expect to find at least a mild inflammatory infiltrate.

Therefore, I will revise the Autopsy Diagnosis as well as the Death Certificate.

Yours truly,

/s/ W. Wike Scamman, M.D.  
W. Wike Scamman, M.D.,  
Coroner

LATTIMORE-FINK LABORA-  
TORIES, INC.

WWS:et

Appendix "E"

- vi -

IN THE SUPREME COURT  
OF THE STATE OF KANSAS

No. 48,534

CAROL NUTTER,  
Appellant,

v.

PERFECTO TORREZ, d/b/a PERFECTO  
PLUMBING AND SEWER SERVICE,  
INCORPORATED, and WILLIAM FURNACE  
COMPANY,  
Appellees.

A F F I D A V I T

STATE OF KANSAS :  
                  :SS  
COUNTY OF SHAWNEE:

The undersigned, of lawful age,  
and being first duly sworn upon his  
oath, deposes and says:

1. That he is a medical  
doctor and coroner;
2. That he recently has  
reviewed the circumstances surrounding  
the death of Daina Torbert Nutter on  
January 17, 1973, and in so doing has  
reviewed the Gross Description and Micro-  
scopic Sections of the Autopsy performed  
on Daina Torbert Nutter, and based on  
such review his opinion is that it is more  
probable that Daina died as a result of  
carbon monoxide and gas inhalation, rather  
than viral pneumonitis, as is indicated  
on the Death Certificate.



3. The medical reason for his opinion is that the lungs showed marked edema along with an area of hemorrhage with practically no inflammation present. Had there been a viral pneumonitis, there would have been at least a mild inflammatory infiltrate, which there was not.

4. That because of his opinion and review of the records as described above, he will revise the Autopsy Diagnosis as well as the Death Certificate to reflect the above.

5. Further affiant saith not.

/s/ W. Wike Scamman, M.D.  
W. WIKE SCAMMAN, M.D.  
Coroner

Subscribed and sworn to before  
me this 4th day of October, 1977.

/s/Shirley L. Phelps  
Notary Public

(Seal)

My Commission Expires:

December 24, 1979

Appendix "F"

IN THE SUPREME COURT  
OF THE STATE OF KANSAS

No. 48,534

CAROL NUTTER,  
Appellant,

v.

PERFECTO TORREZ, d/b/a PERFECTO  
PLUMBING and SEWER SERVICE,  
INCORPORATED, and WILLIAM FURNACE  
COMPANY,  
Appellees.

PETITION FOR RECONSIDERATION  
OF ORDER DENYING NUTTER'S  
PETITION FOR REVIEW

Comes now the appellant above-named, Carol Nutter, and moves this court to reconsider its order of September 8, 1977 whereby Nutter's Petition for Review was denied.

In support hereof, appellant shows the court that summary judgment was granted in this action at the trial level solely because of an uncontroverted coroner's report and death certificate, which report indicated that Nutter's deceased son could not possibly have died from gas inhalation. Likewise, the Kansas Court of Appeals affirmed that summary judgment because of that uncontroverted report and certificate. Your petitioner further assumes that this court declined to grant review of this matter because of that uncontroverted report.

Appellant now shows this court that a recent report from W. Wike Scamman, M.D., Coroner, has reviewed certain portions of the autopsy performed on Nutter's deceased son, and based on that review, finds it "more probable that he (the deceased son) died as a result of carbon monoxide and gas inhalation, rather than viral pneumonitis, as was indicated on the Death Certificate." Because of Dr. Scamman's review of the Death Certificate, and his opinion as to its error, he is going to revise the Autopsy Diagnosis as well as the Death Certificate. (See attached letter to Dr. Scamman.) Dr. Scamman has also executed an affidavit in this regard, which is attached hereto and incorporated herein by reference.

Thus, the public records indicating the cause of your appellant's son's death will indicate that the death was most probably caused by carbon monoxide and gas inhalation. It would be gross injustice to deny Mrs. Nutter her "day in court" in this action because of an error on the part of a public official. It obviously is unjust to say to this appellant that she does not have the right to a jury trial because of a death certificate, when that exact same death certificate has been revised and amended as a matter of public record.

WHEREFORE, your appellant prays that this court reconsider its decision of September 8, 1977 whereby appellant's Petition for Review was denied, and that this court enter a judgment reversing

the trial court's granting of summary judgment and remanding this case to the District Court level for jury trial.

Respectfully submitted,

FRED W. PHELPS - CHARTERED  
3701 West Twelfth Street  
Post Office Box 4391  
Topeka, Kansas 66604  
913/273-1420

By: /s/ Fred W. Phelps, Jr.  
FRED W. PHELPS, Jr.  
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a conformed copy of the above and foregoing "Petition for Reconsideration of Order Denying Nutter's Petition for Review" was regularly mailed this 4th day of October, 1977, to:

James E. Benfer, Esq.  
1400 Topeka Boulevard  
Topeka, Kansas 66612

Herbert A. Marshall, Esq.  
and  
Michael J. Schenk, Esq.  
810 Merchants National Bank  
Building  
Topeka, Kansas 66612

By: /s/ Fred W. Phelps, Jr.  
FRED W. PHELPS, Jr.  
Attorney for Plaintiff.

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rules of the United States Supreme Court, the undersigned hereby certifies and indorses that three copies of the above and foregoing Revised Appendices to Petitioner's Petition for Writ of Certiorari to the Supreme Court of Kansas was served on counsel for all parties concerned, by placing such copies in a United States mail box, with first class postage prepaid, addressed to counsel of record at their post office address as follows:

James Benfer, Esq.  
1400 Topeka Boulevard  
Post Office Box 2217  
Topeka, Kansas 66601,  
Attorney for Perfecto  
Torrez, d/b/a Perfecto  
Plumbing and Sewer Service, Incorporated; and,



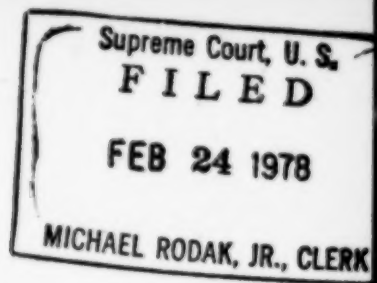
Michael J. Schenk, Esq.  
810 Merchants National  
Bank Building,  
Topeka, Kansas 66612,  
Attorney for William  
Furnace Company.

Such certification is made  
pursuant to Rule 33(1) and 3(b).

Certification is further made  
that such mailing occurred on the 23rd  
day of January, 1978. Further, pursuant to  
Rule 21(3) of the Rules of this Court,  
forty (40) copies of this Revised Appen-  
dices to Petitioner's Petition for Writ of  
Certiorari to the Supreme Court of Kansas  
were mailed, air mail, special delivery,  
postage prepaid, to the Clerk of the  
United States Supreme Court, on the 10  
day of February, 1978.

Robert E. Tilton, Esq.  
TILTON & DILLON  
310 Columbian Title Building  
820 Quincy Street  
Topeka, Kansas 66612  
913/233-9665

Fred W. Phelps, Jr., Esq.  
Phelps Building  
1414 South Topeka Boulevard  
Post Office Box 1886  
Topeka, Kansas 66601  
913/233-4162



No. 77-1053

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19\_\_\_\_\_

CAROL NUTTER,

Petitioner,

vs.

PERFECTO TORREZ d/b/a  
PERFECTO PLUMBING AND  
SEWER SERVICE INC.  
AND WILLIAM FURNACE COMPANY

Respondents.

\_\_\_\_\_  
ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE OF KANSAS

\_\_\_\_\_  
RESPONDENT'S BRIEF IN OPPOSITION

Michael J. Schenk  
MARSHALL, HAWKS, McKINNEY & HENDRIX  
810 Merchants National Bank Building  
Topeka, Kansas 66612 913-354-8574  
Attorney for Respondent  
William Furnace Company

### ARGUMENT

The respondent opposes the petition for writ of certiorari on two grounds:

(1) The Untimely Filing of the Petition Deprives This Court of Jurisdiction Over the Case.

The petition for writ of certiorari is plainly out of time. The judgment of the Kansas Supreme Court denying a review of the Court of Appeals decision was entered on September 8, 1977, simultaneous with its opinion. The rules of the Kansas Supreme Court regarding a motion for rehearing or modification are as follows:

- (a) A motion for rehearing or modification in a case decided by the Supreme Court may be served within twenty (20) days of the date of the decision. The issuance of the mandate shall be stayed pending the determination of the issues raised by such a motion. If a rehearing is granted, such order suspends the

effect of the original decision until the matter is decided on rehearing.

- (b) If no motion for rehearing is filed or upon denial of a motion for rehearing, the clerk of the appellate courts shall, unless the court otherwise orders, issue a mandate on the decision of the Supreme Court to the district court together with a copy of the opinion. (Kansas Appellate Rules No. 7.06)

The petitioner's motion for reconsideration by the Supreme Court was filed in the Kansas Supreme Court on October 4, 1977. This is clearly more than twenty (20) days from the date the Supreme Court entered its order denying a review of the Court of Appeals decision, thereby becoming a final judgment of the lower court. Pursuant to 28 USC §2101(c) the petition for a writ of certiorari must be filed within ninety (90) days upon the entry of the final judgment in the lower court. This period of time expired on December 7, 1977.

In the case of Department of Banking v. Pink 317 US 264, one of the cases cited by the petitioner, this court held that a timely

petition for rehearing tolls the running of the three (3) month period because it operates to suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the right of the parties. Should this Court consider the application for reconsideration filed by the petitioner in the Kansas Supreme Court on October 26, 1977, as timely filed, it would merely toll the running of the ninety (90) day period of time. The Kansas Supreme Court rendered its decision denying that motion for reconsideration on October 26, 1977, and the statutory ninety (90) day filing time would run again. The balance of the ninety (90) day filing time would have expired on December 30, 1977. The petition for certiorari to the Kansas Supreme Court now before this court was not filed until January 23, 1978.

(2) No Federal Question Was Raised for Consideration Before Any of the Courts in the State of Kansas and Therefore this Court Lacks Jurisdiction.

This case was decided by the trial court, the Kansas Court of Appeals and the Kansas Supreme Court solely on the basis of a Kansas state statute. This statute is whether or not the defendants are entitled to judgment as a matter of law on the basis that there was no genuine issue as to any material fact. The state statute in question is K.S.A. 60-256 and is set forth in its entirety in the petitioner's petition beginning on page three (3). There is no Federal question on the face of the record in this case to warrant the jurisdiction of the Supreme Court of the United States to grant the Writ of Certiorari. (Mellon v. O'Neil 275 US 212)

The question attempted to be raised by the petitioner is set forth in the petition on page ten (10), "The Federal question involved herein surrounding right to jury trial and right to due process before deprivation of person and property . . ." was not raised before the trial court nor was it raised on the application for review of the Kansas Supreme Court nor finally was it raised in the petition for reconsideration filed by the petitioner in the Kansas Supreme Court on October 4, 1977. Before the Supreme Court may review the decision of a state court it must appear affirmatively from the record not only that a federal question was presented to the highest court of the state having jurisdiction but that its decision of the federal question was necessary for the determination of the case. (Honeyman v. Hanan 300 US 14; Wilson v. Cook 327 US 474)

The writ of certiorari should be dismissed where a claim advanced by petitioner's attorney

with respect to allegedly unconstitutional application of a state statute was raised for the first time upon certiorari, and the state court had been given no opportunity to pass upon it. (Monks v. New Jersey 398 US 71)

The petitioner is attempting to raise a federal question by alleging denial of her right to a trial by jury and deprivation of property without due process of law, rights granted to her by the 7th and 14th amendments to the United States Constitution. The United States Supreme Court has consistently held that the 7th amendment requirement of a trial by jury is not applicable to proceedings in state court. (Alexander v. Virginia 413 US 836; Curtis v. Loether 415 US 189)

In the case of Hiawauassee River Power Co. v. Carolina Tennessee Power Co. 252 US 341, this Court held that a claim in a state trial court that a ruling was contrary to the 14th amendment of the United States Constitution



affords no basis for a writ of error from the Federal Supreme Court where no such contention was made in the assignment of errors in the highest court of that state nor was it, so far as appears by the record, otherwise presented to or passed on by the court. In this case when the motion for summary judgment was filed in the trial court the petitioner did not raise any issue as to the constitutionality of the state's summary judgment law nor did she raise any argument as to her right to a trial by jury. The issues were not raised nor passed upon by any of the appellate courts in the State of Kansas.

Rule 19 of the United States Supreme Court provides for the considerations governing review on certiorari. This case does not present any federal question of substance not heretofore determined by this Court and therefore the writ should be denied.

#### CONCLUSION

Wherefore, the respondent respectfully submits that the petition for writ of certiorari to the Kansas Supreme Court should be denied for the above and foregoing reasons.

Original signed by:  
Michael J. Schenk

---

Michael J. Schenk  
MARSHALL, HAWKS, MCKINNEY & HENDRIX  
810 Merchants National Bank Building  
Topeka, Kansas 66612 913-354-8574  
Attorney for the Respondent  
William Furnace Company

#### CERTIFICATE OF SERVICE

Pursuant to Rule 33(1) of the Rules of the United States Supreme Court, the undersigned a member of the bar of this Court, hereby certifies and indorses that on the 21<sup>st</sup> day of February, 1978, three copies of the above and foregoing brief in opposition to the petition for writ of certiorari to the Supreme Court of Kansas were served on counsel for all parties

concerned, by placing such copies in the United States mail, first class, postage prepaid, addressed to counsel of record as follows:

James Benfer, 1400 Topeka Boulevard,  
Post Office Box 2217, Topeka, Kansas  
66601, Attorney for Perfecto Torrez,  
d/b/a Perfecto Plumbing and Sewer  
Service, Incorporated; and

Fred W. Phelps Jr.  
Phelps Building  
1414 Topeka Boulevard, P. O. Box 1886  
Topeka, Kansas 66601, Attorney  
for Petitioner; and

Robert E. Tilton, Tilton & Dillon  
1324 Topeka, Topeka, Kansas 66612  
Attorney for Petitioner

Further pursuant to Rule 24 (1) of the rules of this Court, forty (40) copies of this brief in opposition were mailed, first class, United States mail, postage prepaid, return receipt requested, to the Clerk of the United States Supreme Court on the 21<sup>st</sup> day of February, 1978.

Original signed by:  
Michael J. Schenk

---

Michael J. Schenk  
MARSHALL, HAWKS, MCKINNEY & HENDRIX  
810 Merchants National Bank Building  
Topeka, Kansas 66612 913-354-8574  
Attorney for Respondent, William Furnace  
Company